91-107 4.

FILED
JUL 17 1991
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

VINCENT MANCUSI,

Petitioner,

vs.

AKIL AL-JUNDI, a/k/a Herbert Scott Deane; BIG BLACK, a/k/a Frank Smith; ELIZABETH DURHAM, Mother and Legal Representative of Allen Durham, deceased; LITHO LUNDY, Mother and Legal Representative of Charles Lundy, deceased; THERESA HICKS, Widow and Legal Representative of Thomas Hicks, deceased; ALICE McNEIL, Mother and Legal Representative of Lorenzo McNeil, deceased; MARIA SANTOS, Mother and Legal Representative of Santiago Santos, deceased; LAVERN BARKLEY, Mother and Legal Representative of L.D. Barkley, deceased; JOMO JOKA OMOWALE, a/k/a Eric Thompson; VERNON LAFRANQUE; ALFRED PLUMMER; HERBERT X. BLYDEN; JOSEPH LITTLE; ROBIN PALMER; GEORGE "CHE" NIEVES; JAMES B. "RED" MURPHY; THOMAS LOUK; PETER BUTLER; CHARLES "FLIP" CROWLEY; WILLIAM MAYNARD, JR.; CALVIN HUDSON; KIMANTHI MPINGO, a/k/a Edward Dingle; KENDU HAIKU, a/k/a Willie Stokes; OOJI KWESI SEKOU, a/k/a Chris Reed; PHILLIP "WALD" SHIELDS; JEROME ROSENBERG; ALPHONSO ROSS; FRANK LOTT; GARY RICHARD SUMPTER; OMAR SEKOU TOURE, a/k/a Otis McGaughey; DACAJEWEIAH, a/k/a John Hill; and JOHNNIE BARNES, as Administrator of the goods, chattels and credits which were of John Barnes, deceased, on behalf of themselves and all others similarly situated,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR WRIT OF CERTIORARI

RICHARD E. MOOT, ESQ.
Counsel of Record
Attorney for Petitioner Vincent Mancusi
DAMON & MOREY
1000 Cathedral Place
298 Main Street
Buffalo, New York 14202
(716) 856-5500

July 5, 1991

QUESTIONS PRESENTED

1. Is there a constitutional due process limitation on the period of permissible delay in bringing civil cases to trial which, at this time, 20 years after the alleged events, bars the trial of this 42 U.S.C. §1983 class action by Attica inmates against the former Superintendent, Mr. Vincent Mancusi?

2. Does the Court's inherent power to protect societal interests in the just, speedy and inexpensive determination of all civil actions in the Federal Courts warrant the dismissal of this case where the principal defense witnesses have died during the period of delay?

3. Did the Second Circuit erroneously limit the intended scope of this Court's holding in *Whitley v. Albers*, 475 U.S. 312 (1986), by denying Defendant Mancusi the protection of qualified immunity?

List of Parties

Petitioner:

Vincent R. Mancusi – Mr. Mancusi was Superintendent of Attica Correctional Facility during the Attica rebellion on September 13, 1971.

Respondents:

Plaintiffs – Plaintiffs are a class designated by the District Court as all inmates in D-Yard on September 13, 1971 (App. p. A-35).

Other defendants:

The Estate of Major Monahan -- Major Monahan was in charge of the State Troopers and correction officers who carried out the assault to retake the prison and return the prisoners to their cells.

The Estate of Russell G. Oswald – Mr. Oswald was Commissioner of Corrections in charge of the New York State Prison System on September 13, 1971. Governor Rockefeller appointed him in charge of putting down the Attica rebellion.

Karl Pfeil – Mr. Pfeil was defendant Mancusi's Deputy Superintendent at the Attica Correctional Facility at the time of the rebellion.

Additional Defendants in the District Court Proceedings:

The Estate of Nelson A. Rockefeller – Governor Rockefeller personally ordered the retaking of the prison and put Commissioner Oswald in charge. On motion for summary judgment, affirmed by the Court of Appeals, *Al-Jundi v. Estate of Rockefeller*, 885 F.2d 1060 (2d Cir. 1989), the action against the Estate of Rockefeller was dismissed on the grounds of qualified immunity.

Walter Dunbar – Mr. Dunbar was Executive Deputy Commissioner of the Department of Correctional Services and assisted Commissioner Oswald during the Attica rebellion. He has died and his estate has not been substituted.

Major General John C. Baker – General Baker was Commander of the National Guard of the State of New York and Chief of Staff to the Governor. The National Guard, under General Baker's command, was charged with supplying the necessary supportive medical care. The Complaint was dismissed against General Baker for plaintiffs' failure to answer interrogatories.

Other Named Defendants:

Other defendants named in the full title, as it appears in the District Court's Order of June 26, 1990 denying Petitioner's motion for summary judgment of dismissal, who neither have been joined nor have participated in the proceedings below are:

T. Norman Hurd, Director of State Operations of the State of New York;

Wim Van Eekeren, Deputy Commissioner of Department of Correctional Services of the State of New York;

A.C. O'Hara, Commissioner of the Office of General Services of the State of New York;

John C. Miller, Chief Inspector of the Division of State Police of the State of New York;

Leon Vincent, Deputy Superintendent of Attica Correctional Facility under Superintendent Mancusi;

Robert F. Fischer, Special Deputy State Attorney General in charge of Attica prosecutions; and

Dalton Carney, Sheriff of Wyoming County, New York, the county where the Attica Correctional Facility is located.

The following officers and members of the New York State Police not served by the plaintiffs nor made parties to the action but named in the title and described in Paragraph 33 of the Complaint as State Police officers who "participated in and/or failed to take steps to prevent the acts complained of" include: Henry Williams; J.C. Moochler; A.T. Malovich; Robert P. Quick; W.L. Shurter; K.E. Gellert; G.K. Elbert; T.N. Kruk; W. K. Dillon; M. K. Halloran; K.S. Crouse; R. J. Dwyer; P.P. Zelinski; G.R. Toray; J.B. Connell; B. Muthig; D. O. Parr; J. J. Patterson; J.W. McCarthy; D.O. Ellis; and E.M. Byre.

TABLE OF CONTENTS

	Page
Questions presented	i
List of Parties	ii
Table of Contents	v
Table of Authorities	ix
Opinions below	2
Jurisdiction	3
Statement of the Case	4
Reasons for granting the writ	7
I. The extraordinary 20 year delay in this case compels the conclusion that the constitutional due process limitation on delay in bringing a civil case to trial and societal interests require dismissal	7
II. A just trial of this civil action, 20 years after the Attica rebellion, is no longer possible	12
III. The qualified immunity protection of *Whitley v. Albers* extended to Petitioner for the full period of the retaking until the State Police had returned the prisoners to their cells	17
Conclusion	21

TABLE OF CONTENTS

Appendix		Page
A.	U.S. Court of Appeals for the Second Circuit Decision dated 2/27/91 affirming in part and reversing in part the District Court's 6/26/90 Order denying Defendant Mancusi's Motion for Summary Judgment on grounds of qualified immunity. Case remanded to District Court for trial	A-1
B.	Order of U.S. Court of Appeals for the Second Circuit dated 4/18/91 denying Defendant Mancusi's Petition for Rehearing	A-13
C.	U.S. District Court Order dated 7/8/80 for plaintiffs to show cause why case should not be dismissed for failure to prosecute ..	A-15
D.	U.S. District Court Order dated 10/27/80 granting conditional dismissal and decertification of class	A-18
E.	U.S. District Court Order dated 5/15/81 denying Defendant Mancusi's Motion to Dismiss for Failure to Prosecute	A-26
F.	U.S. District Court Order dated 4/2/87 denying Defendant Mancusi's Motion to Dismiss or to Decertify the Class	A-33
G.	U.S. District Court Order dated 6/26/90 denying Defendants' Motions for Summary Judgment	A-42
H.	Notice of Motion dated 3/25/81 by Defendant Mancusi to dismiss for failure of plaintiffs to prosecute with supporting affidavit (B. Fitzgerald)	A-55

		Page
I.	Defendant Mancusi's Motion for Summary Judgment dated 1/13/86 to dismiss certain causes of action and to decertify the class with supporting affidavits (Mancusi & Smyth) and memorandum on behalf of Defendant Mancusi in support of motion to dismiss certain causes of action and other relief	A-64
J.	Additional affidavit of Theresa A. Smyth dated 2/12/86 in support of Defendant Mancusi's motion to dismiss certain causes of action and other relief	A-96
K.	Defendant Mancusi's Motion for Summary Judgment dated 3/20/90 with supporting affidavits (Mancusi & Smyth) and memorandum dismissing the Complaint against him and in the alternative for a hearing *in limine*	A-151
L.	Post Argument Memorandum dated 5/31/90 in support of Defendant Mancusi's Motion for Summary Judgment and Affirmation of Richard E. Moot, Esq. with exhibits in further support thereof	A-188
M.	Petition for Reargument and Suggestion for Hearing *En Banc* dated 3/12/91 for Defendant-Appellant Mancusi	A-262
N.	Plaintiffs' Pre-Trial Statement dated 4/30/91	A-276
O.	United States District Court, WDNY Docket Sheet	A-330
P.	Victory and Rosenberg Affidavits filed May 10, 1990	A-375
Q.	Constitutional Provisions, Statutes and Rules Involved	A-380

TABLE OF AUTHORITIES

	Page
Al-Jundi v. Estate of Rockefeller, et al., Nos. 90-2287, -2289, -2291 (2d Cir. 1991)	2
Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986)	20
Barker v. Wingo, 407 U.S. 514 (1972)	6, 7, 8, 9, 12, 15
Celotex Corp. v. Catrett, 477 U.S. 317 (1986)	20
Edmonson v. Leesville Concrete Co., Inc., 59 U.S.L.W. 4574 (June 4, 1991)	9, 10
Estelle v. Gamble, 429 U.S. 97 (1976)	18
Gregg v. Georgia, 428 U.S. 153 (1976)	18, 20
Inmates of Attica Correctional Facility v. Rockefeller I, 453 F.2d 12 (2d Cir. 1971)	4, n.5
Inmates of Attica Correctional Facility v. Rockefeller II, 477 F.2d 375 (2d Cir. 1973)	4, n.5
In re Sawyer, 360 U.S. 622 (1959)	10
Link v. Wabash Railroad Co., 370 U.S. 626 (1962)	7
Lujan v. National Wildlife Federation, 110 S. Ct. 3177 (1990)	20
Mathews v. Eldridge, 424 U.S. 319 (1976)	11

Page

Moose Lodge No. 107 v. Irvis, 407 U.S. 163 (1972) 9

Nieves v. Oswald, 498 F.2d 802 (2d Cir. 1974) ... n.5

Rose v. Mitchell, 443 U.S. 545 (1979) 10

Tradeways Inc. v. Chrysler Corp., 342 F.2d 350 (2d Cir. 1965) 12

United States v. Taylor, 487 U.S. 326 (1988) 15

U.S. ex rel. Walker v. Mancusi, 338 F.Supp. 311 (W.D.N.Y. 1971), *aff'd*, 467 F.2d 51 (2d Cir. 1972) n.5

Whitley v. Albers, 475 U.S. 312 (1986) 17

Wilson v. Seiter, 59 U.S.L.W. 4671 (June 18, 1991) 18, 20

Wilson v. Westinghouse Electric Corp., 838 F.2d 286 (8th Cir. 1988) 21

No. ____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

VINCENT MANCUSI; KARL PFEIL; RUSSELL G. OSWALD,
Petitioners,

vs.

AKIL AL-JUNDI, a/k/a Herbert Scott Deane; BIG BLACK, a/k/a Frank Smith; ELIZABETH DURHAM, Mother and Legal Representative of Allen Durham, deceased; LITHO LUNDY, Mother and Legal Representative of Charles Lundy, deceased; THERESA HICKS, Widow and Legal Representative of Thomas Hicks, deceased; ALICE McNEIL, Mother and Legal Representative of Lorenzo McNeil, deceased; MARIA SANTOS, Mother and Legal Representative of Santiago Santos, deceased; LAVERN BARKLEY, Mother and Legal Representative of L.D. Barkley, deceased; JOMO JOKA OMOWALE, a/k/a Eric Thompson; VERNON LAFRANQUE; ALFRED PLUMMER; HERBERT X. BLYDEN; JOSEPH LITTLE; ROBIN PALMER; GEORGE "CHE" NIEVES; JAMES B. "RED" MURPHY; THOMAS LOUK; PETER BUTLER; CHARLES "FLIP" CROWLEY; WILLIAM MAYNARD, JR.; CALVIN HUDSON; KIMANTHI MPINGO, a/k/a Edward Dingle; KENDU HAIKU, a/k/a Willie Stokes; OOJI KWESI SEKOU, a/k/a Chris Reed; PHILLIP "WALD" SHIELDS; JEROME ROSENBERG; ALPHONSO ROSS; FRANK LOTT; GARY RICHARD SUMPTER; OMAR SEKOU TOURE, a/k/a Otis McGaughey; DACAJEWEIAH, a/k/a John Hill; and JOHNNIE BARNES, as Administrator of the goods, chattels and credits which were of John Barnes, deceased, on behalf of themselves and all others similarly situated,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION OF THE DEFENDANT VINCENT R. MANCUSI FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Defendant Vincent R. Mancusi Petitions for Writ of Certiorari to review the Judgment of the United States Court of Appeals for the Second Circuit in this case.

OPINIONS BELOW

The Second Circuit Opinion is reported as *Al-Jundi v. Estate of Rockefeller, et, al.*, Nos. 90-2287, -2289, -2291 (2d Cir. 1991), (Appendix pages A-1-A-12) (Appendix page hereinafter App. p.). The Order of the Second Circuit dated April 18, 1991, denying Petition for Reargument and Hearing *En Banc* is submitted herewith (App. pp. A-13-A-14).

The Decision and Memorandum of the District Court, which was the subject of the appeal to the Second Circuit and other decisions and memorandum of the District Court denying motions to dismiss, are:

1. U.S. District Court Order for plaintiffs to show cause why the case should not be dismissed for failure to prosecute dated July 8, 1980 (App. pp. A-15-A-17).

2. U.S. District Court Order granting conditional dismissal and decertification of class dated October 27, 1980 (App. pp. A-18-A-25).

3. U.S. District Court Order denying defendant Mancusi's motion to dismiss for failure to prosecute dated May 15, 1981 (App. pp. A-26-A-32).

4. U.S. District Court Order denying defendant Mancusi's motion to dismiss or to decertify the class dated April 2, 1987 (App. pp. A-33-A-41).

5. U.S. District Court Order denying defendants' motion for summary judgment dated June 26, 1990 (App. pp. A-42-A-54).

JURISDICTION

On February 27, 1991, the Second Circuit issued an opinion affirming the decision of the United States District Court for the Western District of New York which had denied Petitioner's motion for dismissal, and on April 18, 1991, entered an order denying Petitioner's motion for rehearing and argument *en banc*. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1). The statutory basis for federal jurisdiction is 42 U.S.C. §1983.

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES INVOLVED

I. Constitutional Provisions:

— U.S. Const. Amend. V. . . . . App. at 381

— U.S. Const. Amend. VIII . . . . . App. at 381

II. United States Statutes & Rules:

— 42 U.S.C. §1983 . . . . . App. at 380

— 28 U.S.C. §1254(1) . . . . . App. at 380

— 28 U.S.C. §2072 . . . . . App. at 380

— Fed. R. Civ. P. 1 . . . . . App. at 382

— Fed. R. Civ. P. 41(b) . . . . . App. at 382

STATEMENT OF THE CASE

A detailed statement of the facts addressing the circumstances surrounding the Attica rebellion in 1971 are set forth in *Inmates of Attica Correctional Facility v. Rockefeller II*, 477 F.2d 375 (2d Cir. 1973). The material facts necessary for the consideration of the questions presented relate principally to the 17 year delay in bringing this case to trial and do not require a statement of the specific events surrounding the rebellion.

The delay began with the filing of the Complaint on September 13, 1974, three years after the Attica rebellion and the day of the expiration of the Statute of Limitations. *Inmates of the Attica Correctional Facility et al. v. Rockefeller I*, 453 F.2d 12, 13 (1971). The case has dragged on for 17 years ever since. Four attempts in the District Court to obtain a dismissal on behalf of the Petitioner for failure to prosecute or denial of due process have all failed (App. pp. A-16-A-17; A-55-A-63; A-64-A-95; A-151-A-187).

In the sixth year of litigation, on June 13, 1980, the District Court *sua sponte* issued an Order to Show Cause why the action should not be dismissed for failure to prosecute (App. pp. A-16-A-17). A conditional order of dismissal was entered on October 27, 1980 (App. pp. A-18-A-25), however, no dismissal was ordered when the plaintiffs agreed to the substitution of new plaintiffs' counsel and notices were issued to depose the principal defense witnesses and obtain documents (App. pp. A-26-A-31). None of the depositions were scheduled or taken nor have been to this date.

In the seventh year of litigation, on March 24, 1981, the plaintiffs having failed to go forward with any discovery, Petitioner Mancusi and the other defendants moved to dismiss for failure to prosecute (App. pp. A-55-A-63). The motion was denied by the District Court but no scheduling order for depositions or other discovery was entered (App. pp. A-26-A-32).

In the twelfth year of litigation, after four other federal court 42 U.S.C. §1983 ("§1983") actions had been filed naming

Superintendent Mancusi as a defendant had all been concluded,[1] Petitioner again moved for dismissal on January 13, 1986, on the additional grounds that, "requiring defendant Mancusi to defend against the same and additional charges, now 14 years after the event, constitutes a denial of due process" (App. pp. A-64-A-95). Again, the motion for dismissal, after a period of more than a year *sub judice*, was denied by the District Court on April 2, 1987 (App. p. A-359).

In the sixteenth year of litigation, on March 21, 1990, Petitioner Mancusi again moved for summary judgment of dismissal on the grounds of denial of due process and the additional grounds of qualified immunity (App. pp. A-157-A-187). As additional grounds, Mancusi cited Governor Carey's Proclamation of December 30, 1976, terminating, in the interest of justice, all further criminal prosecutions arising out of the Attica rebellion (App. pp. A-93-A-95), and the Second Circuit's dismissal in favor of the Estate of Nelson A. Rockefeller on the grounds of qualified immunity (App. p. A-363). Nonetheless, the District Court again, on June 26, 1990, denied Petitioner Mancusi's motion for summary judgment and dismissal (App. pp. A-42-A-54).

Finally, in the seventeenth year of litigation, on February 27, 1991, the Second Circuit declined to exercise its discretionary pendant appellate jurisdiction and again rejected Petitioner's due process argument and remanded the case for a prompt trial[2] (App. pp. A-1-A-12). The present Petition has followed.

---

[1] These cases, *Inmates of Attica Correctional Facility v. Rockefeller I*, 453 F.2d 12 (2d Cir. 1971); *Inmates of Attica Correctional Facility v. Rockefeller II*, 477 F.2d 375 (2d Cir. 1973); *Nieves v. Oswald*, 498 F.2d 802 (2d Cir. 1974); and *U.S. ex rel. Walker v. Mancusi*, 338 F.Supp. 311 (W.D.N.Y. 1971), *aff'd*, 467 F.2d 51 (2d Cir. 1972), were all cited on both of Petitioner's due process motions to dismiss but none squarely met the requirement of *Res Judicata* or Collateral Estoppel imposed by the District Court.

[2] As suggested in Petitioner's motion for reargument (App. pp. A-262-A-275), trial has not turned out to be so prompt. It is presently set for September 30, 1991, but the District Court has rejected plaintiffs' first Pre-Trial Statement and for the second time ordered one which properly identifies witnesses and documents. Plaintiffs are also still engaged with the Estates of Oswald and Monahan on various motions.

Following the lead of *Barker v. Wingo*, 407 U.S. 514 (1972), this record of delay compels the conclusion that the due process criteria for requiring just, speedy and inexpensive trials of civil actions warrants the granting of this Petition.

REASONS FOR GRANTING THE WRIT

I

THE EXTRAORDINARY 20 YEAR DELAY IN THIS CASE COMPELS THE CONCLUSION THAT THE CONSTITUTIONAL DUE PROCESS LIMITATION ON DELAY IN BRINGING A CIVIL CASE TO TRIAL AND SOCIETAL INTERESTS REQUIRE DISMISSAL

In 1972, this Court in *Barker v. Wingo*, 407 U.S. 514 (1972) considered the constitutional limitation on delay permitted under the Sixth Amendment requirement for speedy trial in criminal cases. That decision led to the Speedy Trial Act of 1974 adopted by Congress two years later. The first question presented by this Petition is whether the time has now come for this Court to address the constitutional due process limitation under the Fifth Amendment for the trial of civil cases. Since the adoption of The Federal Rules of Civil Procedure, all civil cases tried in the federal courts have been under the injunction of Rule 1. "These Rules govern . . . all suits of a civil nature. . . . They shall be construed to secure the just, speedy and inexpensive determination of every action." Fed.R.Civ.P. 1.[3]

The "societal interest in providing a speedy trial" which Justice Powell relied upon in *Barker* has not yet been considered by this Court in applying a due process limitation to the period of delay which constitutes a denial of a just and speedy trial to a civil litigant. 407 U.S. at 519. This Court, in *Link v. Wabash Railroad Co.*, 370 U.S. 626 (1962), affirmed the District Court's dismissal under Rule 41(b) for failure to prosecute a six year old case. The present case reaches beyond the discretionary power of Rule

---

[3] A nationwide Harris opinion poll of state and federal civil trial judges reported on the civil justice system and concluded, in contrast with 17 years in the present case, it takes a typical civil damage suit from the time it is first filed, on an average, 14 months to reach trial. Harris & Associates, *Judges Opinions on Procedural Issues Conducted for Aetna Life & Casualty*, at 14, Table 2.8 (Oct.-Dec. 1987). Abuse of discovery is the most serious cause for delay in the federal courts. *Id.* at 34, Table 4.3. Seventy-five percent of federal court judges believe that in "high stakes" cases, costs were excessive. *Id.* at 91.

41(b). The extraordinary delay, death of principal witnesses, prior litigation and the Governor's proclamation terminating all criminal proceedings raise constitutional due process grounds sufficient for dismissal of this civil action.

In *Barker*, the delay in bringing the defendant to trial was four years. In the present civil case, the delay has been 17 years. As Justice Powell pointed out in *Barker*, "in addition to the general concern that all accused persons be treated according to decent and fair procedures, there is a societal interest in providing a speedy trial which exists separate from, and at times in opposition to, the interests of the accused." 407 U.S. at 519. Seventeen years of delay in the present case, which arises from the notorious Attica rebellion, gives rise to the same compelling societal interest. Delay of this magnitude in a case of nationwide interest brings into question the very functioning of the judicial system and its ability to justly determine civil suits between parties who seek justice in the federal courts.

The consequences of such delay have been well publicized.[4] They border on a national disgrace.[5] One case which occupies the federal courts for 17 years may deny scores, if not hundreds, of other cases the opportunity to be heard and decided. The

---

[4] "For a lot of people, justice delayed is justice denied." Wall St. J., December 3, 1987, (reporting on the Virginia Federal Court's "Rocket Docket"); "People often care less about how much money they get than the process by which they get it." A.B.A.J., July 1, 1988 at 29, excerpts from Tyler, *What is Procedural Justice Used by Citizens to Assess the Fairness of Legal Procedures*, L. & Soc. Rev. at 301-335 (1988) (Thomas R. Tyler, American Bar Foundation researcher, also authored *Social Psychology of Procedural Justice* (Plenum 1988)); "The public is increasingly restless and unwilling to accept delays." *Justice Delayed, Justice Denied*, President's Page, Mich. B.J. at 1012 (Oct. 1985).

[5] In the 1981-82 Annual Report to the Board of Overseers, Derek C. Bok, Harvard University Past President, addressing "A Flawed System", concluded that "most people find their legal rights severely compromised by the long and frustrating delays involved in bringing procedures to a conclusion. From afar, therefore, the legal system looks grossly inequitable and ineffective." The President's Report 1981-82 at 2 (Harvard Press 1982).

same backlog of criminal cases which threatened a breakdown of the trial of the accused persons in *Barker v. Wingo* now threatens all civil litigation.

Judicial time, perhaps the most precious element for the disposition of civil litigation, is grossly squandered by any case which labors through 17 years of litigation and does not reach trial until 20 years after the event. The 356 entries on the docket sheet of the present action provide ample evidence of the squandering of court time. Among these entries are 96 motions in the District Court, two appeals to the Circuit Court and pretrial motions and discovery that are still pending. A measure of the cost of the delays is found in the Estate of Rockefeller's claim against the State of New York for legal fees in the amount of $1,082,296.50. 205 N.Y.L.J. 43 (1991).

Recently, this Court in *Edmonson v. Leesville Concrete Co., Inc.*, 59 U.S.L.W. 4574 (June 4, 1991), held that societal interests in protecting the impartiality of the voir dire in criminal cases extends to civil actions and that "harms recognized are not limited to the criminal sphere. A civil proceeding often implicates significant rights and interests." 59 U.S.L.W. at 4578. Indeed, at times, delay in bringing a civil proceeding to trial harms the defendant no less than delay in a criminal trial. In either case, delay causes the accused person to be deprived of the very thing promised to him upon entry into the judicial system, the right to a speedy and just trial.

As decided in *Edmonson*, the Due Process Clause of the Fifth Amendment applies in civil actions, and violations by participants in the litigation may compose a constitutional violation. *Edmonson* established that "governmental authority may dominate an activity to such an extent that its participants must be deemed to act with the authority of the government and, as a result, be subject to constitutional restraints." 59 U.S.L.W. at 4576, citing *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163, 172 (1972). The Court went on to hold that when "private litigants participate in the [judicial process] they serve an important function within the government and act with its substantial

assistance. . . . [They] represent a unique government function delegated to private litigants by the government and attributable to the government for purposes of invoking constitutional protections." 59 U.S.L.W. at 4578. To be certain, plaintiffs here acted with substantial assistance of the District Court as illustrated by the more than 350 entries on the docket sheet. The injury to the defendant is the "direct result of government delegation and participation." *Id.* In fact, the damage caused by the delay "is made more severe because the government permits it to occur within the courthouse itself." *Id.* As the docket sheet reflects, motions were *sub judice* with the District Court an astonishing seven years. Contribution to delay of this magnitude by a lifetime appointed Federal Judge more than meets the state action requirement. Mr. Mancusi and society are damaged by this egregious delay in the very place "where the law itself unfolds." *Id.*

Mr. Mancusi gained unwanted notoriety for being Superintendent of the Attica Correctional Facility at the time when the Nation's attention was focused on the discord occurring at the Prison. Once again, the Nation's attention is focused on the name "Attica," not because of any activity at the prison, but rather because of the lack of activity and attention the plaintiffs and the District Court have given to this litigation. This case continues to attract the local and national news media. To force this litigation to trial would certainly "cast doubt on the integrity of the judicial process." 59 U.S.L.W. at 4578, quoting *Rose v. Mitchell*, 443 U.S. 545, 556 (1979). In addition, it is clear that such delay in the "courtroom raises serious questions as to the fairness of the proceedings conducted there." 59 U.S.L.W. at 4578. If members of our society are expected to continue to accept, trust and rely on the judicial system, they must have complete assurance that it is working as it should work. To bring this case to trial, 20 years after the event, would make society think, to use the words selected by Justice Brennan, "[t]he law is a[n] ass." *In re Sawyer*, 360 U.S. 622, 634 (1959), quoting C. Dickens, *Oliver Twist*, 377 (1912).

Edmonson began the development of extending vital constitutional protection from criminal to civil cases. The Petitioner

urges this Court to continue this development by extending the *Barker* constitutional requirements for a speedy trial in criminal matters to civil cases where unprecedented delay and the death of most of the critical witnesses has made a just trial no longer possible.

This further extension of criminal due process to civil litigation naturally flows from "the fundamental requirement of due process [which is] the opportunity to be heard 'at a meaningful time and in a meaningful manner.' " *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976).

II

A JUST TRIAL OF THIS CIVIL ACTION, 20 YEARS AFTER THE ATTICA REBELLION, IS NO LONGER POSSIBLE

Delay, as Justice Powell pointed out in *Barker*, can work two ways, to prejudice or to assist the accused. 407 U.S. at 521. The same is true in civil litigation. Delay in meritorious civil actions postpones and often seriously prejudices the plaintiff's right to receive the relief or damages to which he is entitled. But it is also true that delay, particularly in an unmeritorious case, can severely prejudice the defendant. As the litigation drags on and the costs continue to mount, the merits of the case fade and the compulsion to settle increases. At some point it becomes cheaper to pay the plaintiff than the lawyer and the case settles. It is not possible to say how many of the 95% of the civil actions filed in the federal courts settle on this basis, as opposed to going to trial. However, it can hardly be denied in the present case that where legal costs for one of the defendants have reached the proportion of the Rockefeller Estate's claim amounting to $1,082,296.50, enormous pressures have developed to reach a settlement. Disposition of this action on such a basis can hardly meet the requirement of the just trial to which the Petitioner is entitled.

Even more important, as Justice Powell pointed out in *Barker*, "[a]s the time between . . . [the event] and the trial lengthens, witnesses become unavailable or their memories may fade." 407 U.S. at 521. In the present case, notwithstanding 17 years of litigation, the plaintiffs, whether by design or inattention, have not taken a single deposition. All of the principal witnesses with the exception of the Petitioner, Superintendent Mancusi, and his Second Deputy, Karl Pfeil, have now died or become unavailable.

Although certainly not binding on this Court, the Second Circuit in *Tradeways Inc. v. Chrysler Corp.*, 342 F.2d 350 (2d Cir. 1965), held the death of one witness during a five year delay warranted dismissal. In fact, the Second Circuit said it was an abuse of the District Court's discretion not to dismiss the case.

342 F.2d at 352. In the present case, not only one, but five critical witnesses have died during the 17 year delay. Consider the impact on Petitioner Mancusi's defense and the impossibility of obtaining a just trial at this time.

Governor Rockefeller — The Governor approved and authorized the retaking by force. He put Commissioner Oswald in overall charge and Major Monahan of the State Police in charge of the forceful retaking. *Attica: The Official Report of the New York State Special Commission on Attica* 319, 333 (1972). The Governor was in constant telephone communication with Attica throughout Saturday, Sunday and Monday, the day of the retaking. *Id.* at 319. The Governor was given an eyewitness description over the telephone of what was happening during this period. *Id.* Governor Rockefeller is dead. The claim against his estate has been dismissed (App. p. A-363).

Russell G. Oswald — Mr. Oswald was Commissioner of the Department of Correctional Services of the State of New York of which the Attica Correctional Facility was only a part. He was the senior corrections official on the scene. *Attica: The Official Report of the New York State Special Commission on Attica* 215-216. He had been placed in direct charge of putting down the rebellion and was Petitioner Mancusi's immediate superior. *Id.* at 319. He is also now dead, having died a few days after receiving news of the Second Circuit's decision denying him the protection of qualified immunity. A motion is currently pending in the District Court to substitute his estate (App. pp. A-373-A-374).

Walter Dunbar — Mr. Dunbar was Executive Deputy Commissioner of the Department of Correctional Services of the State of New York. 453 F.2d at 15. As Mr. Oswald's Deputy, he was in the prison during the retaking and the return of prisoners to their cells, which occurred under the direction of Major Monahan. *Attica: The Official Report of the New York State Special Commission on Attica* 20, 446. He is now dead. His estate has not been made a party to the action.

Wim Van Eekeren — Mr. Van Eekeren was Deputy Commissioner for Programs at the Department of Correctional Services under Oswald. *Id.* at xxxv. He was present at the scene during the events of the rebellion. His right arm and leg are

paralyzed from a stroke and he requires a brace to walk. He was never properly served or made a party to the action.

John C. Miller – Inspector Miller was Chief Inspector of the Division of State Police and the top ranking State Police officer. *Id.* at 215. He is now dead. His estate has not been substituted as a party.

John Monahan – Major Monahan was Commander of Troop A of the New York State Police, Batavia, New York. *Id.* at 188. He and the men under his command were ordered by Oswald to retake the prison and return the prisoners to their cells. *Id.* at 329, 330, 333. He and his men were in control of D-Yard where the rebellion was subdued and A-Yard where the prisoners were strip-searched and allegedly brutalized while being returned to their cells in the final phase of the retaking. Major Monahan is dead. His no-asset estate has been substituted as a defendant in this action (App. p. 371).

Major General John C. Baker – General Baker was Commander of the National Guard of the State of New York and Chief of Staff to defendant Rockefeller. *Attica: The Official Report of the New York State Special Commission on Attica* 342. He was responsible for the backup emergency medical care during the retaking. *Id.* at 421, 422. Upon the failure of the plaintiffs to answer his interrogatories, his Motion for Summary Judgment was "granted" and the complaint against him dismissed more than 10 years ago (App. pp. 338, 339). He has had several strokes and is no longer able to testify.

A.C. O'Hara – General O'Hara was the Commissioner of the Office of General Services of the State of New York. *Attica: The Official Report of the New York State Special Commission on Attica* at xxxiii. He is dead and his estate has not been made a party.

All other defendants – The other named defendants either were not made parties to the action or have subsequently been dismissed as parties.

It may be suggested by those unfamiliar with the practicalities of civil litigation that this unavailability of witnesses is of Petitioner Mancusi's own making as much as of the plaintiffs. Such is not the case. In the first place, as Justice Powell observed, "A

defendant has no duty to bring himself to trial." *Barker*, 407 U.S. at 527. The same is true for civil litigation. Many civil cases are filed, few are chosen for trial. In the overwhelming percentage of cases, it is not in the defendant's interest to spend his money and his attorney's efforts forcing the plaintiffs to prepare and prosecute a claim against himself.

This was particularly so for the Petitioner, Superintendent Mancusi. By any measure, he was a remote and minor defendant. He had every right to assume that the principal defendants, protecting the deep pockets of Governor Rockefeller's Estate, were entitled to control the litigation and that the disposition of plaintiffs' claim against the Rockefeller Estate would terminate the litigation. When counsel for the Rockefeller Estate requested the Petitioner and other defendants not to join in the Estate's application for qualified immunity on the basis that it might jeopardize the success of that application, counsel for the other defendants wisely concurred in the belief that success of the Estate of Rockefeller would in all likelihood end the matter.

Whether right or wrong in this analysis, it is doubtful, even if the effort were made, that counsel for the Petitioner Mancusi could have succeeded in expediting this trial in the face of the exhaustive documentary discovery insisted upon by the plaintiffs and the delays occasioned by the principal parties and the District Court. The Petitioner did all he could to expedite or end this case by moving for dismissal four times, each effort proving unsuccessful.

The question remains to consider, with whom the responsibility for the delay in this case lies. As a practical matter, delay seldom springs from the action or neglect of a single party. It grows out of the combined interaction of all parties and the Court. The test on defendant's motion to dismiss for delay, introduced by *Barker* and more recently framed by *United States v. Taylor*, 487 U.S. 326 (1988), is whether the defendant himself was the principal cause for the delay. Applying that test to the present case, there can be little doubt that the principal cause for delay rests with the plaintiffs and the District Court not the defendant, Mr. Mancusi. The plaintiffs did not bring suit until three years after the events described in the Complaint. It was

four years after the event before the present amended complaint was framed. For four more years, while the District Court had the defendants' original motion for dismissal *sub judice*, the plaintiffs did nothing to expedite the Court's decision. Plaintiffs allowed their appeal from the District Court's Order granting the motion to dismiss in part to lapse for failure to comply with the Second Circuit's Appeals Management Plan. Six years and five months elapsed from the filing of the Complaint until the filing of plaintiffs' first deposition notices. Depositions noticed 10 years ago still have not been taken.

During the 17 year period of this litigation, the District Court had various motions *sub judice* for an unconscionable seven years. During this period, plaintiffs' counsel never made a single effort to seek a more prompt disposition by the District Court.

By contrast, the delay by Petitioner and other defendants, if not routine, was minor. Four months were used to answer the Amended Complaint; four months were consumed in defendants' motion for protective order with respect to plaintiffs' discovery notice to admit and Petitioner's responses to plaintiffs' discovery notice to admit. On Petitioner's motion, 135 additional days were granted by the Court to further examine and copy Attica documents. The principal contribution to the delay by Petitioner Mancusi was not these relatively routine delays but the three motions on Petitioner's behalf seeking to dismiss the case, first for failure to prosecute and subsequently on due process and qualified immunity grounds. Efforts to expedite the prosecution of the case or obtain its dismissal can hardly be charged as delay on Petitioner's part.

By contrast to any delay which can be arguably charged against the Petitioner, plaintiffs' delay and that of the District Court are a matter of record and not open to debate. Years were spent in initiating the action and drafting the complaint. An unprecedented six years and five months lapsed before any deposition notices were served, and an unconscionable seven years passed while various motions were *sub judice* with the District Court.

III

THE QUALIFIED IMMUNITY PROTECTION OF *WHITLEY V. ALBERS* EXTENDED TO PETITIONER FOR THE FULL PERIOD OF THE RETAKING UNTIL THE STATE POLICE HAD RETURNED THE PRISONERS TO THEIR CELLS

A prison riot begins when the prisoners break out of their cells and the guards lose control over a portion of the prison. It does not end until the prisoners are returned to their cells and safely locked up. The Second Circuit, perhaps misled by the different captions in the Complaint, "The Assault" and "The Reprisals," erred in limiting the *Whitley v. Albers*, 475 U.S. 312 (1986), doctrine simply to the shooting or "assault" portion of subduing the riot, thereby stripping the State Police and prison officials of the intended protection of *Whitley v. Albers* during the last phase of putting down the rebellion when the prisoners were being returned to their cells. It was during the period when State Troopers and correction officers under the command of Major Monahan were returning the prisoners to their cells that the alleged wrongful acts of reprisals took place.

The failure of the Second Circuit to extend the *Whitley v. Albers* qualified immunity protection to the period when the prisoners were being returned to their cells was critically harmful to Petitioner Mancusi's claim for qualified immunity. At the time the prisoners were being returned to their cells, Commissioner Oswald was in overall charge of putting down the rebellion, *Attica: The Official Report of the New York State Special Commission on Attica* 215-216, and Major Monahan was in charge of the State Troopers and correction officers who were carrying out the retaking. *Id.* at 329, 330, 333. Superintendent Mancusi was at his desk in the Administration Building where he had been ordered to stay and handle telephone messages. *Id* at 444-445. The Administration Building was outside the prison itself and from his office Superintendent Mancusi could not see any part of D-Yard where the alleged assault on the prisoners was carried out or A-Yard where the prisoners were strip-searched and returned to their cells. *Id.* at 22, 433.

Mr. Mancusi's affidavit in this respect is fully supported by the McKay Commission.[6] After interviewing over 2170 witnesses, including 270 State Police who participated and had direct knowledge of the riot, 100 sheriffs, undersheriffs and deputies who were inside the prison walls, 200 National Guardsmen, Commissioner Oswald, Deputy Commissioner Dunbar, General Baker, the Governor and his staff as well as 1600 other inmates, the McKay Commission reported its findings. *Id.* at xxvi-xxxiv. It determined that "whether ordered to or not, Superintendent Mancusi remained at his desk throughout the day." *Id.* at 444-445. If this finding of the McKay Commission is accepted, there can be no basis for finding "unnecessary and wanton infliction of pain" or a "culpable state of mind" on the part of Petitioner Mancusi. *See, Estelle v. Gamble*, 429 U.S. 97 (1976); *Gregg v. Georgia*, 428 U.S. 153 (1976) (joint opinion); *See also, Wilson v. Seiter*, 59 U.S.L.W. 4671 (June 18, 1991). Without such a finding, there was no basis for denying Superintendent Mancusi the protection of qualified immunity.

Faced with this difficulty on Petitioner Mancusi's motion for dismissal on the grounds of qualified immunity, which also included a renewal of his prior motion to dismiss on due process grounds, plaintiffs' counsel sought out additional evidence in an effort to create an issue of fact. After the motion for summary judgment had been set for argument, plaintiffs' counsel went to two of their own clients who were at the time still incarcerated in other New York State prisons, and obtained affidavits in attempt to rebut the finding of the McKay Commission. The two page-and-one-half affidavits notarized by plaintiffs' counsel state that the two prisoners saw Superintendent Mancusi on the catwalk inside the prison observing the alleged reprisals while the prisoners were being returned to their cells.

---

[6] The Commission, headed by the Dean of New York University School of Law, was formed by Governor Rockefeller to investigate and report on all aspects of the Attica rebellion. Its report, *Attica: The Official Report of the New York State Special Commission on Attica*, a bound volume of 555 pages, is the definitive work on the subject.

These Victory and Rosenberg affidavits were the first and only evidence offered by any person or contained in any document attempting to show that Superintendent Mancusi had any knowledge of the reprisals (App. pp. A-188-A-206, A-375-A-379 *see also*, Opinion of Federal District Court Judge John T. Curtin (App. p. A-232)). They were prepared 19 years after the events in a desperate effort to create an issue of fact and to defeat Petitioner Mancusi's motion.[7] The original signed affidavits were not even filed until after argument of the motion.

In the Second Circuit, Petitioner Mancusi unsuccessfully argued these affidavits were unworthy of belief and insufficient to raise an issue of fact to defeat the motion as a matter of law because:

(i) The page and a half of plain assertions of events 19 years ago containing no significant details are directly contrary to the exhaustive, impartial McKay Commission investigation and conclusion which was based on interviews with more than 2170 eyewitnesses immediately following the rebellion.

(ii) The affidavits were taken by plaintiffs' counsel of their own clients, each of whom is seeking to recover $1 million in damages based upon their own naked assertions.

(iii) The affidavits were a desperate attempt to create an issue of fact to avoid the District Court's prior

---

[7] Defendant Mancusi moved for summary judgment on the grounds of qualified immunity submitting the required Rule 13 Statement of Uncontroverted Facts on March 21, 1990 (App. pp. A-151-A-187). At a hearing on April 3, 1990, the District Court extended a briefing schedule requiring plaintiffs to file and serve answering papers on April 23, 1990 and setting oral argument on the motion on May 9, 1990 (App. pp. A-366-A-367). Plaintiffs filed their opposition to defendants' motions without the required Rule 13 Statement of Uncontroverted Facts on May 9, 1990, sixteen days past the return date (Dist. Ct. Docket Entry No. 310; *see also*, App. pp. A-199-A-205). One day after the oral argument took place, the Victory and Rosenberg affidavits were filed with the Court, swearing to events for the first time that allegedly occurred almost 20 years before (Dist. Ct. Docket Entry Nos. 311 and 312; *See also*, App. pp. A-375-A-379 (unsigned affidavits)).

ruling and the Second Circuit's decision which had granted qualified immunity to the Estate of Nelson A. Rockefeller.

Since the rendering of the decision by the Second Circuit affirming the denial of Petitioner's motion to dismiss, an additional ground for rejecting the Victory and Rosenberg affidavits has been established. On June 17, 1991, this Court in, *Wilson v. Seiter*, 59 U.S.L.W. 4671, held that in order to defeat the claim of qualified immunity in a §1983 action claiming cruel and unusual punishment, the plaintiffs must show a culpable state of mind on the part of the prison officials. 59 U.S.L.W. 4671 (June 18, 1991). Thus, even considering the highly suspect Victory and Rosenberg affidavits, the requisite elements for an Eighth Amendment violation are not present. *See also*, *Gregg v. Georgia*, 428 U.S. 153 (1976). Admitting, for argument's sake only, the validity of the Victory and Rosenberg affidavits, the plaintiffs have failed to establish or even address a vital element of an Eighth Amendment violation – culpable state of mind by Mr. Mancusi.

The last minute Victory and Rosenberg affidavits, like those submitted in *Lujan v. National Wildlife Federation*, 110 S. Ct. 3177 (1990) fail to show "those specific facts that are necessary to support the claim." Id at 3189. Even if taken as true, the incredible claim of a party plaintiff in contradiction to the McKay Commission remains insufficient. The "culpable state of mind" on the part of Petitioner Mancusi remains unproven. As the Court in *Lujan* pointed out, last minute affidavits are insufficient under *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986), to defeat a motion for summary judgment. 110 S. Ct. at 3188. "[T]he plain language of Rule 56(c) mandates the entry of summary judgment . . . against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case." 110 S. Ct. at 3186, quoting *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986).

Furthermore, as *Lujan* held in reinstating the summary judgment of the District Court, affidavits submitted after the

argument on the motion for summary judgment are untimely and should not have been considered by the Circuit Court. 110 S. Ct. at 3191, 3192. Although not binding on this Court, the court in *Wilson v. Westinghouse Electric Corp.*, 838 F.2d 286 (8th Cir. 1988), observed that such untimely affidavits cannot be used to create an issue of fact on the motion. Allowing such a procedure would mean "no case would ever be appropriate for summary judgment." *Id.* at 289.

CONCLUSION

The harms of delay are not limited to criminal cases. Significant rights and interests of the parties and society at large are also at stake in civil cases.

Fundamental to Petitioner Mancusi's due process right to defend himself is the opportunity to have the case heard and justly determined at a meaningful time and in a meaningful manner.

A trial twenty years after the Attica rebellion, when most of the principal witnesses are dead, does not provide that opportunity.

It is respectfully requested that this Petition be granted.

Dated: July 5, 1991

RICHARD E. MOOT, ESQ.
DAMON & MOREY
1000 Cathedral Place
298 Main Street
Buffalo, New York 14202
Telephone (716) 856-5500

Attorney for Petitioner
Vincent Mancusi